

IN THE COURT OF COMMON PLEAS
LAKE COUNTY, OHIO

FILED

BISHOP-WILLOUGHBY COMPANY,
LTD.

Plaintiff, MAUREEN G. KELLY
LAKE CO. CLERK OF COURT

v.

CITY OF WILLOUGHBY HILLS,

Defendant.

CASE NO. 13 CV 002709

JUDGE: EUGENE A LUCCI

AGREED JUDGMENT ENTRY
AND ORDER

The within cause came for review upon the pleadings and the agreement of the parties, by and through their respective counsel, as indicated by the approvals of the within judgment hereinafter set forth.

Plaintiff seeks a declaration the (1) the prohibition by the City's Codified Ordinances of the intended use of certain commercial real property located at 2821 Bishop Road, Willoughby Hills, Ohio (the "Property") by Plaintiff's proposed tenant, American Heritage Motorcycles, LLC or its designee ("Proposed Tenant"), is arbitrary, capricious and unreasonable as applied solely to this Property and does not advance the health, safety, morals or general welfare of the City, such that it is, therefore, unconstitutional, and (2) that Plaintiff is entitled to develop and use the Property for the retail sale, rental and repair of motor vehicles, including motorcycles, parts and accessories, and clothing (the "Intended Use"). Plaintiff further seeks an order (1) requiring the City to issue all approvals and permits necessary for Proposed Tenant's development and use of the Property for the Intended Use pursuant to a B-3 zoning classification or use variance, subject to Plaintiff's presentation to and the approval of the City's planning commission and other applicable administrative bodies as required by the City's Codified Ordinances and any other applicable law, and (2) requiring the City to re-zone the Property to a B-3 zoning classification.

The City denied that Plaintiff is entitled to the requested relief and asserted a number of affirmative defenses in its Answer. Plaintiff filed a Motion for Summary Judgment on February

6, 2014, which is pending. Upon consideration of the merits of this action, the City has determined the allegations to be well founded as to the Property and that an agreed resolution of Plaintiff's claims will allow the City to ensure that any development and further use of the Property is accomplished in accord with the health, safety and general welfare of the City.

The parties agree that, notwithstanding any possibility that administrative remedies may be available to Plaintiff, where an ordinance is challenged on constitutional grounds as it is in this case, declaratory relief in the first instance is appropriate. *See G.S.T. v Avon Lake (1976), 48 Ohio St. 2d 63, 65.*

The Court makes the following findings of fact on the basis of the pleadings, materials, agreements and stipulations submitted by the parties in support of the same, and the representations of counsel for the parties:

1. On or about November 14, 2013, Plaintiff entered into a letter of intent to Lease (the "Letter of Intent"), as "Lessor," with Proposed Tenant, as "Lessee," for the lease of commercial real property located at 2821 Bishop Road, Willoughby Hills, Ohio, Permanent Parcel Nos. 31-A-008-D-00-031-0 and 31-A-008-D-00-032-0 (the "Property").
2. The Property currently has the zoning designation of B-2 (Commercial Campus/Mixed Use) pursuant to the Willoughby Hills Planning and Zoning Code (the "Zoning Code") Chapter 1137.02(e), which does not permit the sale or leasing of vehicles on the Property.
3. The current zoning designation of B-2 for the Property does not permit the Intended Use of the Property by Proposed Tenant.
4. There are two parcels to the south of the Property (the "South Properties") that have the same zoning designation of B-2. However the South Properties may be used for the retail sale, rental and repair of motor vehicles, including motorcycles. One South Property constitutes a legally non-conforming use because its use predates the enactment of the City's zoning code and the other South Property obtained its zoning designation via a court order declaring the B-2 zoning designation unconstitutional with respect to that

property. In addition, the parcel directly to the west and across the street from the Property (the "West Property") is zoned B-3, is part of a B-3 business district within the City, and may be used for the sale, rental and repair of motor vehicles, including motorcycles.

5. The parties agree and stipulate that Plaintiff's lease of the Property to the Proposed Tenant's for the Intended Use is necessary as Plaintiff has been a long time property owner and has been unable to find any other type of tenant for the Property.
6. The parties further agree and stipulate that the B-3 zoning classification would permit the Intended Use of the Property and would also be consistent with the current use of the surrounding South Properties and West Property.
7. The Willoughby Hills Charter states in pertinent part as follows at Section 5.15, Mandatory Public Vote on Land Use Changes:

Any change to the existing permitted uses in zoning districts, or any changes in the Municipal Zoning Map...cannot be approved unless and until it shall have been submitted to the Planning Commission, for approval or disapproval. In the event the City Council should approve any of the preceding changes, whether approved or disapproved by the Planning Commission it shall not be approved or passed by the declaration of an emergency, and it shall not be effective, but it shall be mandatory that the same be approved by a majority vote of all votes cast of the qualified electors of the City of Willoughby Hills at the next regular Municipal election, [which] shall occur not less than sixty (60) or more than hundred and twenty (120) days after its passage, otherwise at a special election falling on the generally established day of the primary election. Said issue shall be submitted to the electors of the City only after approval of a change of existing land use by the Council for an applicant. Should the land use request not be affirmed by a majority vote it cannot be presented again for on full year and new request must be made at that time.

8. The Willoughby Hills Charter states in pertinent part as follows at Section 5.32, Board of Building and Zoning Appeals, Duties and Responsibilities:

The Board of Zoning Appeals does not have administrative authority to determine or grant changes to permitted uses in zoning districts that have not been approved by public vote as defined by Section 5.15 and 6.2 of [sic] Charter of the City of Willoughby Hills.

9. The Willoughby Hills Charter states in pertinent part as follows at Section 6.2, Effective Date of Ordinances:

No ordinance or measure which provides for a change in the existing Municipal Zoning Map or which otherwise provides for a change in the use of property from the uses presently authorized by the existing Zoning Code of the Municipality shall go into effect until approved by a majority of those voting upon it at the next succeeding primary or general election, in any year, occurring subsequent to sixty days after the approval of such ordinance or measure by the Mayor or the overriding by Council of the disapproval of such ordinance or measure, whichever occurs later to the electors of the Municipality in the manner provided by law for the submission of ordinances or measures upon the filing of a proper referendum petition.

10. The parties stipulate and agree that the Board of Building and Zoning Appeals of the City is without any power to grant a use variance to permit the Intended Use.
11. The parties also stipulate and agree that either there are no administrative remedies available to Plaintiff or any such remedies that may exist are, under the circumstances, futile, unduly onerous or unusually expensive.
12. The Plaintiff stipulates that upon approval of this Agreed Judgment Entry and except for the remedies and awards granted by this Court herein, Plaintiff herein releases and dismisses any and all of its other claims for damages, with prejudice, including but not limited to any Shemo damages that could have or may have been awarded in connection with this case.
13. It is further agreed by the parties that (1) the development limitations created by the current zoning classification for the Property excessively and unreasonably limit the potential for rational use and development of the Property, (2) the Intended Use would be compatible with established land use patterns in the immediate vicinity and would constitute reasonable and appropriate use of the Property consistent with sound zoning principles and good land use planning practices, and (3) the City's B-2 zoning classification of the Property is arbitrary, capricious, unreasonable and has no substantial relation to the public health, safety, morals or general welfare of the City as applied to the Property only.

14. The legal implications of these factual findings relative to the use of the Property are to be viewed through the standards established by the United States Supreme Court in *Euclid v. Ambler Co.* (1926) 272 U. S. 365, 71 L.Ed 303, and the law of Ohio established in *Goldberg Cos., Inc. v. Richmond Hts. City Council* (1998), 81 Ohio St. 3d 207, syllabus, that:

A zoning regulation is presumed to be constitutional unless determined by the court to be clearly arbitrary and without substantial relation to the public health, safety, morals or general welfare of the community.

In *Shemo v. Mayfield Hts.* (2000), 88 Ohio St. 3d 7, 10, quoting, *Goldberg, supra.*, 81 Ohio St.3d at 214, the Ohio Supreme Court held that:

[A] zoning ordinance will be struck down if a property owner challenging the ordinance proves, beyond a fair debate, that the ordinance is "arbitrary and unreasonable and without substantial relation to the public health, safety, morals, or general welfare of the community."

15. In this case, Plaintiff does not challenge the constitutionality of the City's zoning ordinance on its face, but only as applied to the Property. The United States Supreme Court held in *Euclid v. Ambler Realty Co.* supra:

The ordinance now under review, and all similar laws and regulations, must find their justification in some aspect of the police power, asserted for the public welfare. The line which in this field separates the legitimate from the illegitimate assumption of power is not capable of precise delimitation. It varies with circumstances and conditions. A regulatory zoning ordinance, which would be clearly valid as applied to the great cities, might be clearly invalid as applied to rural communities. [T]he question whether the power exists to forbid the erection of a building of a particular kind or for a particular use, like the question whether a particular thing is a nuisance, is to be determined, not by an abstract consideration of the building or of the thing considered apart, but by considering it in connection with the circumstances and the locality...

272 U.S. at 387-388.

16. In the Complaint, the Plaintiff herein challenges the restrictions and prohibitions imposed by the City's zoning ordinances, as applied to the Intended Use for the Property. In *Karches v. Cincinnati* (1988), 38 Ohio St.3d 12, 16, the Ohio Supreme Court held that:

[A] declaratory judgment action challenges the constitutionality of an existing zoning ordinance as applied to a particular parcel of property is the central question. It may, but need not, involve a question as to the constitutionality of a prohibition against a specific proposed use.

17. The Court finds based on the evidence presented, the agreement and stipulations of the parties and applicable law, as set forth herein, that there is no genuine issue as to any material fact and that Plaintiff has demonstrated beyond fair debate that the prohibition by the City's zoning ordinances of the Intended Use sought by the Plaintiff as limited to the Property is unreasonable, arbitrary and capricious, because it does not advance, substantially or otherwise, any governmental interest of the City.
18. The Court further finds that, pursuant to Chapter 2721 of the Ohio Revised Code, Plaintiff is entitled to declaratory judgment in its favor on both counts of its Complaint, as well as such further relief as is necessary and proper to effectuate and preserve all of its rights, as set forth herein below.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that judgment be and is hereby entered in favor of Plaintiff against the City on all counts of the Complaint and that Plaintiff, its successors and assigns, are entitled to use and maintain the Property for the retail sale, rental and repair of motor vehicles, including motorcycles, parts and accessories, and clothing and, generally, for the uses now permitted as of right in the areas within the City have a B-3 zoning classification;

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the Property shall be re-zoned to a B-3 zoning classification;

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the City shall issue all approvals and permits for the development, use and maintenance by Plaintiff, its

successors and assigns, of the Property in accordance with the Intended Use, subject further to compliance by the Plaintiff, its successors and assigns, with all other ordinances of the City applicable to the development and use of the Property, including, without limitation, Plaintiff's presentation to and the approval of the City's planning commission and other administrative bodies if and to the extent required by law, which approval shall not be unreasonably withheld, conditioned or delayed, it being acknowledged and agreed by the City that no such approval may be withheld, conditioned or delayed based upon the zoning classification of the Property or the Intended Use;

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the parties shall execute any and all such further agreements and documents as are necessary to memorialize and/or carry into effect the terms of this judgment and order and consents thereto shall not be unreasonably withheld;

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the parties, their successors and assigns, shall be free, as they should so mutually agree, to modify any terms and conditions of site development, use and maintenance so as to effectuate and not unreasonably hinder the development and use of the Property in accordance with the purposes and intents set forth herein;

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that except for the remedies and awards granted by this Court herein, Plaintiff herein releases and dismisses any and all of its other claims for damages, with prejudice, including but not limited to any Shemo damages that could have or may have been awarded in connection with this case.

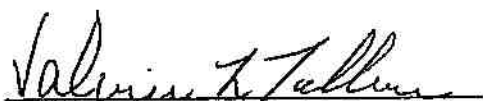
IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the Plaintiff shall pay the costs of this action. The Court shall retain jurisdiction to enforce the provisions of this judgment and order or any issues which arise as consequence thereof.

IT IS SO ORDERED.



JUDGE: EUGENE A. LUCCI

CONSENTED TO AND APPROVED BY:



Valerie L. Tolbert (#0068055)
27500 Detroit Road, Suite 300
Westlake Ohio 44145
(440) 892-6800
Attorney for Plaintiff
Bishop-Willoughby Company, LTD.



Thomas G. Lobe, Esq.
THOMAS G. LOBE CO., L.P.A.
614 West Superior Avenue, Suite 1300
Cleveland, Ohio 44113
Phone: (216) 861-6820
Fax: (216) 664-6999
tomlobe@yahoo.com
Attorneys for Defendants
City of Willoughby Hills.